United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1955

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

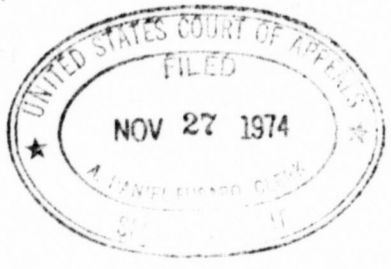
RICHARD BELANGER,

Appellant.

Docket No. 74-1955

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court (The Honorable Morris E. Lasker) rendered on July 12, 1974, convicting appellant Richard Belanger of conspiracy to violate the Federal narcotics laws (count one) in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(a), and possession of approximately five hundred pounds of marijuana (count two), in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(B). Appellant was sentenced to one year of imprisonment on each count, the sentences to run concurrently, and to a term of two years' special parole, pursuant to 21 U.S.C. §841, following the term of imprisonment.

The District Court continued appellant's release on a $2,500 personal recognizance bond pending appeal.

By order of this Court dated November 7, 1974, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The indictment* here alleges a continuous conspiracy from August 1971 to December 1973, involving eleven named defendants.

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*The indictment is annexed as "B" to appellant's separate appendix.

The trial below involved seven of these defendants.* In support of the conspiracy charge, the Government submitted proof relating to five distinct trips to Jamaica wherein large quantities of marijuana were smuggled (or attempted to be smuggled) into the United States. These trips and the alleged participants, according to the Government's proof, may be summarized as follows:

1.	August 1971	(1)	Dominic Mecca
		(2)	Gary Stephan
		(3)	Paul Stephan
		(4)	James Adams
		(5)	Richard Thurlow
2.	March 1973	(1)	Dominic Mecca
		(2)	James Adams
		(3)	Nicholas Calabro
		(4)	Richard Belanger
		(5)	Steven Smith
		(6)	Gary Stephan
		(7)	Paul Stephan
		(8)	Robert Vissa
		(9)	Robert Wilner
		(10)	Anthony Coviello
		(11)	Richard Palmer
		(12)	Richard Thurlow
		(13)	Gerald Mitchell
3.	May 1973**	(1)	Dominic Mecca
		(2)	Robert Wilner
		(3)	Robert Vissa
		(4)	Richard Palmer

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*The defendant Richard Palmer pleaded guilty to conspiracy (count one) immediately prior to commencement of the trial and testified on behalf of the Government as one of its chief witnesses at trial. The defendants James Adams, Dominic Mecca, and Anthony Coviello were severed prior to trial.

**This trip, which was allegedly successful in bringing in five hundred pounds of marijuana, is the basis of the substantive offense charged in count two, i.e., possession of marijuana with intent to distribute.

		(5) Paul Stephan
		(6) Gary Stephan
		(7) Nicholas Calabro
		(8) Anthony Coviello
		(9) Gerald Mitchell
4.	June 1973	Same as May 1973
5.	August 1973	(1) Dominic Mecca
		(2) James Adams
		(3) Richard Palmer

At the close of the Government's case, the District Court ruled that insufficient proof was introduced to establish that the August 1971 and an August 1973 trip were part of the single alleged conspiracy, and accordingly struck all testimony relating to those events. The substantive offense, which relates solely to possession in the Southern District of New York of the marijuana smuggled into the United States on the May 1973 trip was submitted to the jury on the Pinkerton theory, as well as on aiding and abetting and direct participation. The jury convicted appellant Belanger, Robert Wilner, and Robert Vissa; the other four defendants -- Nicholas Calabro, Steven Smith, Gary Stephan, and Paul Stephan -- were acquitted.

A. The Government's Case

The Government's case was presented almost exclusively through the testimony of three witnesses: the co-defendant Richard Palmer, and the unindicted co-conspirators Richard Thurlow and Gerald Mitchell. The Government's proof related to the plans, preparation, and execution of five separate trips to Jamaica listed above.

1. The Conspiracy

(a) The August 1971 Trip

According to the testimony of Richard Thurlow, approximately six hundred pounds of marijuana were successfully smuggled into Miami, Florida, aboard the fifty-eight foot charter boat, Alison (33*). Those involved were Gary and Paul Stephan, Dominic Mecca, and Jack Tratham. According to Thurlow's testimony, at that time he was employed as a mate aboard the Alison. Jack Tratham was the paid captain of the vessel. Some time in August 1971, Paul Stephan and Dominic Mecca chartered the boat and, at the latter's direction, the vessel was sailed to Montego Bay, Jamaica, where approximately six hundred pounds of marijuana were loaded aboard. The boat then returned to Miami (25-37), where the cargo was unloaded and taken by car to Tratham's house and later distributed (40-42). Tratham and Thurlow were paid in one hundred fifty pounds of marijuana, out of which Thurlow netted approximately $6,000 and Tratham approximately $17,000. Testimony relating to this venture was subsequently stricken when the Court found insufficient proof that this was part of the conspiracy alleged in the indictment (1816, 2106).

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*Numerals in parentheses refer to pages of the transcript of the trial.

(b) The March 1973 Trip

Thurlow testified that some time in November 1972 he was contacted by Dominic Mecca, who asked if Thurlow would be interested in a captain position on one of the charter fishing vessels owned by Air-Seas Charters, Inc., of which Mecca was an officer. Thurlow agreed (53-56). In December 1972, at the suggestion and recommendation of Thurlow, the co-defendant Stephan Smith, a friend of Thurlow's from Miami, was hired as an engineer (59). In early January 1973, Robert Wilner, appellant Belanger, Dominic Mecca, and Thurlow had a conversation at Thurlow's house wherein Wilner announced that in order to finance continuation of the extensive renovation and repairs on two of the corporation's charter vessels and the recent acquisition of a Piper Aztec airplane, it would be necessary to bring in a load of marijuana from Jamaica (59). After some discussion it was decided that the safest way to do this was to fly the marijuana from Jamaica to a suitable island in the Bahamas from which it could be picked up and brought into the United States by boat (65). Several days later Thurlow introduced James Adams to appellant Belanger. According to Thurlow, Adams had an operation in Runaway Bay, Jamaica, manufacturing hashish from marijuana, and needed a way of bringing it into the United States. Belanger later discussed the Adams proposal with Wilner and Mecca, and the latter agreed to share expenses and profits equally with Adams (67-73).

In late January, Belanger, Wilner, Mecca, Thurlow, and Palmer* began searching for a "suitable ... drop spot" to leave the marijuana (74-75; 1337-1347), and a twenty-three foot Sea Craft was purchased by Air-Seas Charters, Inc., with $12,000 provided by Adams (79-80). In the latter part of February, Thurlow, Belanger, Mecca, and Wilner visited Sal Black, who took them to Adams's hashish operation in Runaway Bay, where they sampled hashish and talked to the workers to ascertain when "the product" would be ready for pick-up. They were informed that nothing would be available for two weeks (86-88). They then returned to the United States.

In Miami, more immediate preparations for the upcoming trip were made in early March. With the assistance of Steven Smith and Gerald Mitchell and (on one occasion) James Adams, Thurlow began breaking in the motors on the Sea Craft to be used to transport the contraband from the drop spot into Miami (95). Alternate unloading points were set up and practice runs conducted, often at night, to see how the marine patrols would react (92-95; 649-650). In early March Palmer, Belanger, and Mecca flew to Runaway Bay and located a suitable airstrip where the plane could be loaded without drawing attention, and extra

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*Palmer initially became involved in the case in January 1973, at the request of government agents, as an informant. He allegedly participated in this capacity until shortly after the aborted March 1973 trip, when, apparently disenchanged with the Government's repeated but unfulfilled assurances that he would be compensated for his work, he continued his involvement for his own personal benefit without reporting to the Government (1330, 1602).

jerry jugs containing plane fuel were secreted in the brush on Williams Island by Wilner and Palmer (1382-1388).

On March 4, 1973, Wilner and Palmer flew to the Porto Sico airstrip and loaded their plane with approximately six hundred pounds of marijuana and then flew to Williams Island, a small, uninhabited island in the Bahamas which contained a landing strip suitable for a small plane. The six hundred pounds of marijuana were stashed under a tarpaulin, and that evening, on their return, Thurlow and Smith were dispatched from Miami in the Sea Craft to pick up the marijuana (95-97; 1387-1391). On March 7, Smith and Thurlow were arrested on Williams Island by Bahamian authorities* while loading the burlap sacks of marijuana aboard the Sea Craft (98, 1393). Federal and Bahamian authorities had been tipped off by the defendant Palmer, who at that time was working as an unpaid government informant** (98-99).

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*Smith and Thurlow were subsequently tried and convicted in the Bahamas and sentenced to a year at hard labor and a $1,000 fine (139).

**Thurlow's account of the events on Williams Island on March 7, 1973, was corroborated by the Bahamian arresting officer, Sergeant Robinson (575-587), and by Special Agent Wall of the United States Customs Service, who was also present on the island that day and observed the arrest and events leading up to it (1457-1467). These events were videotaped by another agent and excerpts were shown to the jury (467).

(c) The May 1973 Trip: The Basis for the Substantive Offense of Possession of Marijuana (Count Two)

The Government introduced no proof linking appellant Belanger to any of the events described below.

In late March 1973, on Mecca's instructions, Mitchell went to Southwest Harbor, Maine, where he was directed to help Robert Vissa prepare the sloop Good News for an ocean voyage to Jamaica in June of that year, the purpose of the proposed voyage being to smuggle marijuana into Maine aboard the vessel. Mitchell was informed that this trip was being "financed" by Mecca, Wilner, and Paul Stephan, as "partners" (660-661).

Around May 13, 1973, according to Mitchell's testimony, a trip to Jamaica was organized on short notice to finance the cost of outfitting the Good News for the June ocean trip (662). Those participating in the May venture were Vissa, Wilner, Mecca, Coviello, the Stephans, Calabro, and Palmer (662-682).

According to Palmer's testimony, on May 15 he and Mecca flew to St. Ann's Bay, Jamaica, in Wilner's plane, where they were met by Mecca and Paul Stephan, who loaded the plane with marijuana. The plane was immediately re-fueled, and flown to Williams Island where the cargo was dropped in the water to a waiting boat which retrieved the bales and returned to Miami (1397-1406). The Government offered no proof that this marijuana was from the same source as that in the March trip, nor

did it show that Adams was involved in this venture.

The marijuana, which weighed approximately five hundred pounds, was unloaded from the boat and transported to the Rye Hilton Hotel, located in Port Chester, New York, in cars driven by Mitchell and Coviello. These two were met at the Rye Hilton by Mecca and Wilner, and all four proceeded to Vissa's and Calabro's home in Stanford, Connecticut, where the contraband was weighed and packaged (670-678; 960-961).

(d) The June 1973 Trip

Here, too, the Government introduced no proof of appellant Belanger's participation, and failed to show Adams's involvement and the source of the smuggled marijuana.

In the June 1973 trip to Jamaica, the marijuana was again picked up by a plane in Jamaica and flown to the vicinity of Williams Island in the Bahamas, where they were met by a visiting boat. Two private planes were involved in this trip: Wilner and Mitchell in one, Palmer and Vissa in the other. Anthony Coviello and Gary Stephan manned the boat. Nick Calabro and Mitchell transported the marijuana north by car after it was unloaded in Florida. However, en route to New York, Mitchell was stopped by a state trooper* on the New Jersey Turnpike, and

*The Government called New Jersey trooper Solinski, who testified concerning the discovery of two hundred fifty-five pounds of marijuana in the trunk of the car Mitchell drove on the New Jersey Turnpike on June 12 (1184-1189).

the marijuana was discovered in the trunk of the car. Mitchell was arrested for possession, and thereafter confined to the Salem County Jail for several months* (685-710; 1409-1417).

(e) The August 1973 Trip

The August trip involved Palmer, Mecca, and Adams. A private rental plane was used by Palmer because the men "had severed ... relationship with Wilner." The marijuana -- six hundred pounds -- was brought in from Jamaica from a source the Government did not identify (1423-1426). The marijuana was flown to Williams Island and picked up by boat and brought to Florida (1538-1542). The Court subsequently found that there was insufficient proof that this venture was related to the conspiracy alleged.**

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*It was during this period that Mitchell began cooperating with the authorities.

**Palmer also testified concerning a November trip which he made alone by plane to Jamaica, returning with seven hundred pounds of marijuana (1424, 1456). The Government conceded that this trip was not part of the conspiracy alleged in the indictment (1444).

2. The Scope of Appellant Belanger's Agreement to Conspire

Appellant Belanger's first involvement in the alleged scheme, according to Thurlow's testimony, occurred in January 1973 at Thurlow's house in North Miami. Those present were Thurlow, Belanger, Wilner, and Mecca. Wilner announced that to finance continued work on the boats and the recent acquisition of a plane, he wanted to bring "a load" of marijuana into the United States by plane* (59-60). Ensuing conversations in which Belanger participated related to the specific proposed trip (60-62).

Several days later, having spoken to his friend James Adams, Thurlow again contacted Belanger, informing him that Adams had a hash operation in Runaway Bay, Jamaica, and was looking for transportation for getting "that hash" into the United States (70). The following day, Thurlow introduced Belanger to Adams. According to Thurlow, Belanger told Adams that they were interested in doing business with Adams "at the time because they [Air-Seas Charter, Inc.] were running short of money"** (71).

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*Significantly, when Thurlow was hired by Mecca to work for Air-Seas Charter, Inc., mention was not made of marijuana smuggling, but only of the legitimate charger fishing business in which the corporation was actively engaged (55).

**A fifty-fifty split between the two groups was tentatively discussed at that time (72).

Several days later a meeting attended by Thurlow, Belanger, Wilner, and Mecca took place in New York, where Adams's proposal was again discussed. Here, too, only one proposed trip was discussed.

Thereafter, according to Thurlow, he, Palmer, Wilner, Mecca, and Belanger undertook to find a suitable island containing an airstrip "to leave the product to be picked up at a later date" (75).

The next testimony bearing on the scope of Belanger's agreement occurs in Thurlow's testimony describing a trip by Belanger, Mecca, and Thurlow to Jamaica on February 26, 1973. They visited the place where Adams's hashish operation was housed and spoke to the workers concerning when they could pick up "the product." Here again there was no reference to more than one trip (86-88).

According to Mitchell's testimony, in March 1973 he was advised by Mecca and Belanger of the arrest of Thurlow and Smith on Williams Island (654-655). At that time Mecca indicated that another trip was contemplated. This was the last contact Mitchell had with appellant Belanger. Subsequent conversation between Mitchell and Mecca established that the trip to which Mecca referred was the June 1973 ocean trip aboard the sloop Good News, which never took place (656). Thurlow further testified that Mecca, in early May 1973, stated that this trip was being financed by himself, Wilner, and Paul Stephan as "partners" (660), and that the May 15, 1973, trip was

undertaken to finance needed repairs and improvements on the Good News to ready it for the June voyage to Jamaica (663).

The Government established that appellant Belanger was assigned no role in the May or June trips to Jamaica (682-695), and that he derived no personal benefit from either. Upon Mitchell's arrest in New Jersey in June 1973, it was Belanger and Mecca who provided Mitchell with $2,000 to retain counsel (1171).

The February 1973 conversation taped by Palmer at Wilner's house on February 22, 1973, in which Belanger, Mecca, and Wilner participated, relates to plans and preparations for the anticipated March trip. Moreover, Palmer readily acknowledged that he at no time had any contact with Belanger in connection with the planning, preparation, or execution of the May trip (1627-1628).

B. The Government's Summation

On summation, the Government encouraged the jury to associate participation in Air-Seas Charter, Inc., with membership in the conspiracy:

> ... Look at the rolls of this corporation, this Air Seas Charter. We submit there is no doubt about the chairman of the board, and that is Robert Wilner. Mecca would be your executive vice president. Belanger and Vissa other officers. The pilot, of course, was Palmer. The drivers were Mitchell and Calabro. Boat men were Thurlow,

> Smith, and Gary Stephan, and the trouble-shooter, the guy that pops up a little bit here and there, is Mr. Paul Stephan.
>
> (2098).

Later in its summation the Government attempted to arouse the jury's passions by reference to the "problems of drugs:"

> ... The problems of drugs in this community need no amplification, not only in this community but in this country. We are dealing here with a very serious case. Every case is serious. But there is a lot of marijuana and a lot of money involved in these bags.
>
> (2103).

And in a further attempt to inflame the jury, the Government asserted:

> ... Thurlow did his time, Mitchell did his time, Palmer is going to get sentenced in a few weeks. How about the rest of them?
>
> Ladies and gentlemen, if you let them walk out of here, they'll be laughing all the way to Williams Island.
>
> (2103).

Defense counsel made proper and timely objection to all these remarks* (2158-2160). However, the District Court gave no curative instructions.

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*In response to objections to these remarks, Judge Lasker stated:

> ... I would have preferred that there had been no reference to the narcotics, and I saw you and Mr. LaRossa [defense counsel] shaking your heads, and maybe I would have preferred it just because I did see you shaking your heads, but I believe that I emphasized to the jury the fact that they should disregard what the subject matter of the indictment was, and in any

C. The Charge

The Court instructed the jury that it could find a defendant guilty of the substantive offense, i.e., possession of approximately five hundred pounds of marijuana at the Rye Hilton Hotel in Port Chester, New York, in mid-May 1973, on any one of three theories: (1) direct participation; (2) aiding and abetting; or (3) the Pinkerton theory* (2140-2142).

The Court failed to instruct the jury to consider the scope of appellant Belanger's agreement to conspire, and did not charge the jury that if the scope of Belanger's agreement extended only to the March 1973 trip and did not encompass the May trip, then he could not be found guilty of the substantive offense.

> event I didn't find Mr. Truebner's remark prejudicial, although I thought it was perhaps a little poorly chosen.
>
> I think it is only fair to the Government for me to observe, in case an appellate judge reads what I am now saying, that I felt that Mr. Truebner's summation was made in a very calm, dispassionate tone, and that that is something which must be taken into consideration by the trial judge in reaching a decision on these matters.
>
> (2159-2160).

*Since the Government offered no proof of appellant Belanger's involvement after the aborted March 1973 trip, his guilt on count two can rest only on the Pinkerton theory. Pinkerton v. United States, 328 U.S. 640 (1946).

The latter deficiency in the Court's instructions to the jury was further compounded by giving an "all or nothing" charge* and instructions concerning the presumption of continuation of the conspiracy and each individual's involvement until the contrary is shown:

> ... A conspiracy, once formed, is presumed to have continued until its object is accomplished or until there is an affirmative act of termination by its members or it is otherwise clearly terminated, or for example, by arrest of the defendant.
>
> So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until the termination of the conspiracy, unless there is affirmative proof of his withdrawal or disassociation from it.
>
> (2136).

After deliberation, the jury convicted appellant Belanger on both counts of the indictment.

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* On the other hand, if you find that the evidence does not show one overall conspiracy but, instead, shows the existence of a number of separate and independent conspiracies, each with its own aims and objectives and each with his own separate nucleus or corps of conspirators, then you would have multiple conspiracies and the Government would have failed to establish the single overall conspiracy as charged and in that event you would have to acquit the defendants on the charge of conspiracy.

(2127).

ARGUMENT

Point I

THE GOVERNMENT'S FAILURE TO SHOW THAT THE SUBSTANTIVE OFFENSE WAS WITHIN THE SCOPE OF APPELLANT BELANGER'S AGREEMENT TO CONSPIRE, AND THE DISTRICT COURT'S FAILURE TO FOCUS THE JURY'S ATTENTION ON THE CRITICAL ELEMENT IN THE CHARGE, MANDATE REVERSAL OF THE JUDGMENT ON BOTH COUNTS.

The Government introduced proof to show that appellant Belanger participated in the planning, preparation, and execution of the aborted March 1973 attempt to smuggle marijuana into the United States. As to all subsequent trips, however, including the May 1973 trip which serves as the basis for the substantive possession charged in count two of the indictment, the Government submitted no proof to show that Belanger was a participant. Since Belanger's guilt on the substantive offense is premised solely on the Pinkerton theory, the Government's case must conclusively establish that the particular conspiracy agreement entered into by appellant Belanger continued beyond the March 1973 trip and encompassed the May trip. Pinkerton v. United States, 328 U.S. 640 (1945); United States v. Borelli, 336 F.2d 376 (2d Cir. 1964) (Friendly, J.). The Government's proof on this point is insufficient, and therefore the substantive offense (count two) should be reversed and dismissed. United States v. Freeman, 498 F.2d 569 (2d Cir. 1974) (Friendly, J.). Moreover, the improper submission of the substantive

count to the jury on the Pinkerton theory adversel affected the jury's deliberations on the conspiracy count, and therefore that count, too, must be reversed. United States v. Cantone, 426 F.2d 902 (2d Cir. 1970) (Hays, J.).

In addition, the court below failed to focus the jury's attention to the scope of Belanger's particular agreement to conspire in determining his guilt on the conspiracy charge and the substantive offense based on the Pinkerton theory. This constitutes plain error. United States v. Borelli, supra.

A. Insufficiency of the Evidence

Since the Government failed to show that Belanger participated in the substantive offense, the verdict of guilty on this count can be sustained on the Pinkerton theory only if the Government established beyond a reasonable doubt that the conspiratorial agreement of appellant Belanger included the May trip, which is the basis for the substantive offense. United States v. Pinkerton, supra; United States v. Freeman, supra; United States v. Borelli, supra.

The scope of this agreement is determined solely from the acts and declaration of appellant Belanger, which must conclusively establish that he promoted the venture and made it "his own:"

> ... [T]he scope of this agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well-known phrase, in order for a man to be held

> for joining others in a conspiracy, he "must in some sense promote their venture himself, make it his own," United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd., 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), it becomes essential to determine what he is promoting and making "his own".
>
> United States v. Borelli, supra, 336 F.2d at 385.

See also United States v. Freeman, supra, 498 F.2d at 573-574.

Application of the "stake in the venture" test to the proof shows that the Government has failed to establish through Belanger's acts and declarations that his "particular" agreement in the conspiracy extended beyond the March 1973 trip and continued to the May trip.

First, it is beyond dispute that the Government's proof fails to establish that Belanger participated in or was even asked to participate in the unlawful May venture. Similarly, there is no evidence to show that appellant Belanger derived any financial benefit from the May venture.

Second, the May trip, which is the basis for the substantive offense, was of spontaneous origin, organized in mid-May on very short notice, to finance the needed repairs and expenses on the sloop Good News, which was then being outfitted for an extended ocean voyage from Maine to Jamaica and back, to take place in June 1973 for the purpose of smuggling marijuana into the United States. The Government established that the June ocean venture was financed by Wilner, Mecca, and Paul Stephan, as partners, and did not commence until the end of March 1973, several weeks after the last proof of Belanger's

involvement.

Third, Thurlow's testimony concerning the initial discussion of marijuana smuggling among the defendants establishes that Wilner proposed a single trip for the specific purpose of alleviating the financial pressures caused by the recent acquisition of a private airplane and the extensive repairs and renovations then in progress on two boats the corporation intended to use in its charter business. Several days later, when Adams's proposal (to share profits and expenses on the hashish equally) was discussed, first between Belanger and Adams, and later among Belanger, Wilner, and Mecca, no more than one trip to Jamaica was ever mentioned. Repeated mention of the corporation's current financial problems as the reason for this illegal undertaking further suggests that repeated trips to Jamaica were not contemplated at that time. Subsequent conversations and activities which the Government established involving Belanger relate solely to this aborted March 1973 trip, and thus lends further support to this view.

Fourth, the Government's proof fails to show that the co-defendant Adams participated in the May trip or that the marijuana smuggled into New York on the May trip was from the same source as that involved in the aborted March trip.

In short, the Government's proof fails to establish beyond a reasonable doubt that the May trip was within the scope of Belanger's agreement. That trip was spontaneously planned; Belanger had no stake in it; he had no financial interest in

the venture; and at no time did he promote or participate in it, and he derived no benefit from it. Accordingly, the evidence is insufficient to sustain Belanger's conviction under count two on the Pinkerton theory. United States v. Freeman, supra; United States v. Borelli, supra; United States v. Falcone, supra, 109 F.2d at 581 (Hand, J.).

Moreover, Belanger's conviction on the conspiracy charge (count one) must also be reversed. Since the jury verdict on the substantive offense rests solely on the Pinkerton theory, it is clear that Belanger was held responsible under count one for acts beyond the scope of his particular agreement to conspire. Thus, the Judge's improper submission of the substantive count to the jury as to appellant Belanger on the Pinkerton theory also tainted the jury's determination of his guilt on the conspiracy charge, and therefore reversal is required. United States v. Cantone, supra, 426 F.2d at 905 (Hays, J.).

B. The Court's failure to focus on the scope of Belanger's agreement constitutes plain error.

The scope of Belanger's particular agreement to conspire is critical as to count two because if the substantive offense is beyond the scope of his particular agreement, guilt on the Pinkerton theory must fall. It is of equal importance to the conspiracy count since Belanger may not be convicted based on

acts outside the scope of his agreement. United States v. Borelli, supra, 336 F.2d at 385, 386 n.4 (Friendly, J.).

The court below never focused the jury's attention on the scope of Belanger's particular agreement to conspire. To the contrary, the Judge's instructions conveyed the idea that if the jury should find that the single conspiracy alleged in the indictment existed, the agreement of all members was coterminus. This mistaken impression was fastered by the "all or nothing" charge,* and by the Judge's instruction that the conspiracy and each member's participation is presumed to continue until termination unless the contrary is proved.**

In United States v. Borelli, supra, the scope of several members' agreement to conspire was considered critical in determining whether the Government had commenced prosecution within the five-year statute of limitations. There being no affirmative proof of withdrawal, the Government there contended that the last overt act of any member of the conspiracy must be imputed to all other members, and thus that the statute of limitations was not a bar to prosecution. In reversing for plain error, this Court held that the trial judge had the affirmative obligation to focus the jury's attention on the scope of each individual member's agreement to conspire as reflected

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*The Judge charged that if the Government proved more than one conspiracy, all the defendants should be acquitted (2127).

**See Appellant's Separate Appendix "C" at 2136).

by the Government's proof:

> ... [W]here the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the Court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants.
>
> United States v. Borelli, supra, 336 F.2d at 386 n.4.

The scope of Belanger's agreement here is of critical import because guilt as to count two is premised solely on the Pinkerton theory. It is of paramount importance as to the conspiracy charge because, if the jury concluded that the May, June, and August trips, which comprised three-fourths of the alleged conspiracy, were not within the scope of Belanger's agreement to conspire, the jurors would be obliged to disregard this evidence in ascertaining his guilt on the March trip.

As in Borelli, the District Court's failure properly to address the jury's attention to this critical issue mandates reversal.

C. In the event of reversal on only the substantive count, the case should be remanded for re-sentencing on the conspiracy count.

While appellant Belanger strongly urges that the errors discussed above mandate reversal as to both counts of the indictment, should this Court determine that only the conviction

as to the substantive count warrants reversal, there nevertheless should be a remand for re-sentencing as to the conspiracy charge. Although Judge Lasker imposed concurrent sentences on both counts, the fact of conviction on both the conspiracy and the substantive count doubtless affected the sentence on each, and therefore a remand to permit reconsideration of the sentence imposed on the remaining charge is essential. United States v. Sperling, Doc. No. 73-2363, slip opinion 5637 at 5669-5670 (2d Cir., October 10, 1974). This is especially important here, since the District Judge, when imposing sentence, undoubtedly took into consideration the May, June, and August trips for which Belanger is not responsible.

Point II

THE GOVERNMENT'S SUMMATION PREJUDICED THE JURY'S DELIBERATIONS AND DENIED APPELLANT BELANGER A FAIR TRIAL.

The prosecutor in a Federal trial is charged with the promotion of justice rather than the interests of any particular party to a controversy. As the Supreme Court stated, in Berger v. United States, 295 U.S. 78 (1935), he is the representative of a sovereignty "whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id., at 88. In this case, during his summation to the jury, the Assistant United States Attorney used the prestige of the Government he was representing to urge a misleading theory of guilt, and made inflammatory remarks designed to arouse the passions of the jury, which had the effect of denying appellant Belanger his right to a fair trial.

Despite the legitimate charter fishing business in which Air-Seas Charter, Inc., was actively engaged, the Government urged the jury to equate lawful membership in the corporation with membership in the conspiracy. This was improper, and diverted the jury from the real issues:

> ... Look at the rolls of this corporation, this Air-Seas Charter. We submit there is no doubt about the chairman of the board, and that is Robert Wilner. Mecca would be your executive vice-president. Belanger and Vissa other officers. The pilot, of course, was Palmer. The drivers were Mitchell and Calabro. Boat men were Thurlow,

> Smith, and Gary Stephan, and the trouble-shooter, the guy that pops up a little bit here and a little bit there, is Mr. Paul Stephan.
>
> (2098).

There followed several statements which had no conceivable purpose other than to appeal on an emotional level to the jurors and to prejudice them against appellant Belanger and the other defendants:

> ... The problem of drugs in this community needs no amplification, not only in this community, but in this country. We are dealing here with a very serious case. Every case is serious. But there is a lot of marijuana and a lot of money involved in these bags.
>
> (2103).

At another point, the Government urged the jury to convict the defendants to enable the court to mete out equal punishment to the conspirators here on trial, and even went so far as to admonish the jurors that a vote of acquittal here would be a mandate to the defendants to return to drug smuggling:

> ... Thurlow did his time, Mitchell did his time, Palmer is going to get sentenced in a few weeks. How about the rest of them?
>
> ... Ladies and gentlemen, if you let them walk out of here, they'll be laughing all the way to Williams Island.
>
> (2103).

This comment was particularly damaging here where the trial court gave no instruction to disregard the fact that the co-

defendant Palmer pleaded guilty in assessing the guilt of the defendants on trial. United States v. Aronson, 319 F.2d 48, 52 (2d Cir. 1963).

It is an Assistant United States Attorney's obligation "above all else to be fair and objective and to keep his argument within the issues of the case...." United States v. Burgos, 304 F.2d 177, 179 (2d Cir. 1969). See also United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); United States v. White, 486 F.2d 204 (2d Cir. 1973).

Despite defense counsel's timely and proper objection, the trial court gave no curative instructions, and thus the errors went uncorrected.

CONCLUSION

For the above-stated reasons, the judgment of conviction on the conspiracy count as to appellant Belanger should be reversed and remanded for a new trial, and the judgment on the substantive offense as to appellant Belanger reversed and dismissed. Alternatively, this Court should reverse and dismiss the substantive offense, and remand for re-sentence as to the conspiracy charge.

Respectfully submitted,

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Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Thos. Sanders